# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1934

# No. 773

JACK ESCOE, PETITIONER,

*vs.*

FRED G. ZERBST, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX


| | Original | Print |
|---|---|---|
| Proceedings in U. S. C. C. A., Tenth Circuit | A | 1 |
| Caption ..... (omitted in printing) | A | |
| Record from D. C. U. S., District of Kansas | 1 | 1 |
| Citation and service ..... (omitted in printing) | 1 | |
| Petition for writ of habeas corpus | 2 | 1 |
| Affidavit in forma pauperis | 4 | 3 |
| Application for appointment of attorney | 5 | 3 |
| Certified copy of proceedings in U. S. District Court for the Eastern District of Texas: | | |
| Indictment | 6 | 4 |
| Judgment | 7 | 5 |
| Order revoking suspended sentence and ordering commitment | 8 | 6 |
| Motion to dismiss petition for writ of habeas corpus | 9 | 7 |
| Response to petition | 10 | 7 |
| Letter, July 27, 1933, A. Escoe to United States Probation Officer | 12 | 10 |
| Letter, July 29, 1933, United States Probation Officer to A. Escoe | 13 | 11 |


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| | Original | Print |
|---|---|---|
| Letter July 30, 1933, A. Escoe and Mrs. Escoe to United States Probation Officer | 14 | 12 |
| Letter, July 31, 1933, United States Probation Officer to A. Escoe | 15 | 13 |
| Exhibit 1—Certified copy of proceedings in United States District Court for the Eastern District of Texas: | | |
| Indictment (copy) ... (omitted in printing) | 16 | |
| Journal entry of plea, judgment and sentence (copy) (omitted in printing) | 17 | |
| Application for capias and order thereon | 19 | 14 |
| Capias and Marshal's return | 20 | 15 |
| Report of Probation Officer and order thereon | 21 | 16 |
| Commitment and Marshal's return | 23 | 18 |
| Order denying motion to dismiss and denying writ | 26 | 20 |
| Notice of appeal | 27 | 21 |
| Petition for appeal | 27 | 22 |
| Order allowing appeal | 28 | 23 |
| Assignment of errors | 28 | 23 |
| Præcipe for transcript of record | 30 | 24 |
| Motion for leave to proceed in forma pauperis | 31 | 25 |
| Affidavit in forma pauperis | 32 | 25 |
| Clerk's certificate ... (omitted in printing) | 33 | |
| Order granting leave to prosecute appeal in forma pauperis | 34 | 25 |
| Order of submission | 35 | 27 |
| Opinion, Johnson, J. | 36 | 28 |
| Judgment | 47 | 37 |
| Petition for rehearing | 47 | 37 |
| Order denying petition for rehearing | 49 | 38 |
| Clerk's note re mandate | 49 | 38 |
| Clerk's certificate ... (omitted in printing) | 50 | |
| Order allowing certiorari | 51 | 39 |

[fols. a & b] [Caption omitted]

[fol. 1] Citation in usual form showing service on L. E. Wyman, filed April 5, 1934 omitted in printing.

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[fol. 2] **IN UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF KANSAS, FIRST DIVISION**

Case No. 336-H. C.

In re JACK ESCOE, Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS—Filed Dec. 1, 1933

To the Honorable John C. Pollock, United States District Judge.

Now comes your petitioner and respectfully shows to your Honorable Court, that on October 5, 1932, he appeared before the United States District Court, Eastern Division, of the District of Texas, at Tyler, Texas, to answer an indictment alleged a violation of the National Motor Vehicle Theft Act. A certified copy of said indictment is hereto attached. (Case Number 3490.)

Your petitioner further shows that he entered a plea of guilty to said indictment, and was sentenced by said Court, and said sentence be and the same is hereby suspended for a period of five (5) years on conditions of probation and the defendant be placed in charge of the District Probation Officer for that length of time. A certified copy of the judgment and sentence is hereto attached.

Your petitioner further shows that while he was at liberty under the Suspended Sentence, he was arrested at Marshall, Texas, on an order of the United States District Court, for the Eastern District of Texas, Tyler Division. Your petitioner shows that instead of being taken before said Court at Tyler, Texas, and given a hearing as provided by law, and the Constitution of the United States, he was on August 11, 1933, brought directly from Paris, Texas, by a Deputy United States Marshal, Mr. Crow, and surrendered to the Warden of the United States Penitentiary, at Leavenworth, Kansas, where he has at all time since been imprisoned.

[fol. 3] Your petitioner shows that by reason of the fact that he was not taken before the Court to answer to the charge of violation of his Suspended Sentence, and that by reason of the fact that he was brought directly to the United States Penitentiary, at Leavenworth, Kansas, without such hearing before the Court that sentenced him, he is unlawfully imprisoned and restrained of his liberty.

Your petitioner further shows that he is unable to attach to this petition a copy of the commitment under which he is held in said last named prison for the reason that is informed that under the rules and regulations of the Department of Justice, the Warden of said Penitentiary is not allowed to furnish copies of commitments nor to allow anyone to inspect or make a copy of the commitment of any prisoner in his charge and that your petitioner is unable to state the terms or conditions of said commitment under which he is held, but states and alleges that he is unlawfully and illegally held and confined in said penitentiary by Fred G. Zerbst, as Warden of the United States Penitentiary, at Leavenworth, Kansas.

Your petitioner further shows that he is unable to attach to this petition a copy of the warrant under which he was arrested at Marshall, Texas, or the order addressed to the Deputy United States Marshal, Mr. Crow, directing him to transport your petitioner to the United States Penitentiary, Leavenworth, Kansas. It is the opinion and belief of your petitioner that said warrant and order were delivered to the Warden of the United States Penitentiary at Leavenworth, Kansas, coincident with the delivery of your petitioner.

Wherefore, your petitioner prays that a writ of habeas corpus issue, directed to Fred G. Zerbst, Warden of the United States Penitentiary, at Leavenworth, Kansas, ordering and directing him to produce your petitioner before this Honorable Court at the time to be stated in said writ and praying that upon a hearing that thereon your petitioner may be discharged from further confinement.

Jack Escoe, Petitioner

[fol. 4] *Duly sworn to by Jack Escoe. Jurat omitted in printing.*

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EXHIBIT "A"

Case No. 3499. Certified Copy of Indictment. United States District Court, District of Eastern Texas, Tyler Division. United States vs. Jack Escoe.

EXHIBIT "B"

Certified copy of judgment and sentence. United States District Court, District of Eastern Texas, Tyler Division. United States of America, plaintiff, against Jack Escoe, defendant.

AFFIDAVIT IN FORMA PAUPERIS

Jack Escoe, of lawful age being first duly sworn according to law deposes and says:

That he is the same Jack Escoe who signed the foregoing and attached petition for a writ of habeas corpus; and that on account of his poverty he is unable to make a deposit for the costs in said cause; that he has no property of any kind or nature from which he could make such amounts; that on account of his imprisonment and restraint, he is deprived of his earning power and unable to earn any amount from which to pay said costs; affiant further says that he has a meritorious case and that justice be done, this petition for a writ of habeas corpus may be ordered filed by this court, under the forma pauperis, as in such cases made and pro-
[fol. 5] vided. Further affiant saith not.

Jack Escoe, Affiant

Subscribed and sworn to before me this 22 day of Nov. 1933 A. D.

E. C. Eckhold, Notary Public, County of Leavenworth, State of Kansas. (Notarial Seal.) My commission expires April 29, 1935.

Case No. 336 H. C.

In re JACK ESCOE, Habeas Corpus

APPLICATION FOR APPOINTMENT OF ATTORNEY

To the Honorable John C. Pollock, United States District Judge.

Jack Escoe, of lawful age being first duly sworn according to law deposes and says:

That on account of his poverty, he is unable to employ an attorney and respectfully requests the court to appoint him an attorney and represent him in the case entitled: In Re: Jack Escoe, Petition for Writ of Habeas Corpus.

Jack Escoe, Petitioner.

Subscribed and sworn to before me this 22 day of Nov. 1933 A. D.

E. H. Eckholdt, Notary Public. (Notarial Seal.)
My commission expires April 29, 1935.

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[fol. 6] INDICTMENT

UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

In the District Court of the United States in and for the Eastern District aforesaid, at the Tyler October Term thereof, A. D. 1933.

The Grand Jurors of the United States, impaneled, sworn and charged at the Term aforesaid, of the Court aforesaid, on their oath present, that one Jack Escoe, alias Jack Adams, alias Jack Thomas, on the 28th day of January, in the year of our Lord nineteen hundred thirty-two in the Tyler Division of said district and within the jurisdiction of said Court, did then and there unlawfully, knowingly, fraudulently and feloniously transport in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, within the Tyler Division and aforesaid district and within the jurisdiction of said court, a certain motor vehicle not designed for running on rails, to-wit: one Chevrolet Roadster Motor No. 2129335, then and there of the approximate value of $300.00, and the property of the "U Drive It Car Company", of New Orleans, Louisiana, and which said automobile had theretofore been stolen and taken from the possession of G. E. Fisher as Manager of the said "U Drive It Car Company", a corporation, incorporated under the laws of the State of Mississippi, and without the consent of that corporation and G. E. Fisher, Manager thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Signed) J. H. Calhoun, Foreman of the Grand Jury.
(Signed) S. D. Bennett, United States Attorney.

Endorsed: No. 3499. District Court United States, Eastern District of Texas. The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas. Indictment. Vio.

National Motor Vehicle Theft Act. A True Bill. (Signed) J. H. Calhoun, Foreman. Filed Oct. 4, A. D. 1932. F. A. King, Clerk, By H. C. Blades, Deputy. S. D. Bennett, U. S. Attorney.

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[fol. 7] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Cr. No. 3499

THE UNITED STATES

vs.

JACK ESCOE, alias JACK ADAMS, alias JACK THOMAS

JUDGMENT

On this, the 5th day of October, A. D. 1932, came the United States Attorney and announced ready for trial and the defendant, Jack Escoe, alias Jack Adams, alias Jack Thomas, appearing in his own proper person announced ready for trial.

Whereupon, the defendant being duly arraigned upon the charge contained in the indictment herein filed against him, plead guilty.

Thereafter, to-wit, on the 10th day of October, A. D. 1932, the defendant again appearing and being asked by the Court if he had anything to say why the judgment and sentence of the Court should not be pronounced upon him, in accordance with his confessed plea of guilty, entered in this cause on the 5th day of October, A. D. 1932, and no good cause being shown why the judgment and sentence should not be pronounced herein;

It is, therefore, considered by the Court and so ordered, adjudged and decreed that the defendant is guilty of violation of the National Motor Vehicle Theft Act, to-wit: of unlawfully, knowingly, fraudulently and feloniously transporting in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, a certain motor vehicle, a Chevrolet Roadster, knowing same to have been stolen property as charged in the indictment herein, and his punishment is fixed and assessed as follows:

That the defendant be imprisoned in the United States Penitentiary at Leavenworth, Kansas for a period of four (4) years and six (6) months.

It appearing to the satisfaction of the Court that the ends of Justice and the best interest of the public, as well as that of the defendant, will be subserved by the suspension of the execution of the sentence pronounced herein;
[fol. 8] It is therefore considered by the Court, and so ordered, that said sentence be and the same is hereby suspended for a period of five (5) years on conditions of probation and the defendant be placed in charge of the District Probation Officer for that length of time.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Cr. No. 3499

THE UNITED STATES

vs.

JACK ESCOE, alias JACK ADAMS, alias JACK THOMAS

ORDER MADE ON AND ATTACHED TO MOTION TO REVOKE SUSPENDED SENTENCE

Ordered that the suspended sentence heretofore granted the defendant be, and the same is hereby in all things revoked, and the clerk will issue a commitment and deliver the same to the United States Marshal for execution.
This August 5, 1933.

(Signed) Randolph Bryant, Judge.

UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

I, F. A. King, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original indictment, judgment of conviction and sentence, and order revoking suspended sentence and directing clerk to issue commitment as of August 5, 1933; in the case of United States vs. Jack Escoe, alias Jack Adams, alias [fol. 9] Jack Thomas, Cr. No. 3499, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed by name and affixed the seal of the aforesaid Court at Tyler, Texas, this 17th day of November, A. D. 1933.

F. A. King, Clerk, by Susie Kerr, Deputy Clerk. (Seal.)

Endorsed: Cr. No. 3499. United States District Court, Eastern District of Texas. The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas. Certified copy indictment, judgment of conviction and sentence, order revoking suspended sentence.

[File endorsement omitted]

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed Dec. 18, 1933

Comes now the respondent, Fred G. Zerbst, Warden, and moves the court to dismiss the petition for writ of habeas corpus filed herein for the reason that said petition does not state facts sufficient to give the court power, authority or jurisdiction to grant the writ prayed for.

S. M. Brewster, United States Attorney. L. E. Wyman, Assistant U. S. Attorney.

[File endorsement omitted.]

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[fol. 10] IN UNITED STATES DISTRICT COURT

RESPONSE TO PETITION—Filed Jan. 26, 1934

Now comes the respondent, F. G. Zerbst, Warden, by S. M. Brewster, United States Attorney, and L. E. Wyman, Assistant United States Attorney for the District of Kansas, and for response to the petition filed herein alleges:

That the petition on its face with exhibits attached does not state facts sufficient to give this court power, authority or jurisdiction to grant the writ prayed for.

Respondent admits as alleged in the petition that the petitioner entered a plea of guilty on October 5, 1932, in the District Court of the United States for the Eastern District

of Texas, Tyler, Division, to a charge of violating the National Motor Vehicle Theft Act and that there is attached to the petition filed herein a certified copy of the indictment and a certified copy of the journal entry of plea, judgment and sentence pronounced by the court in his case. Respondent further alleges that there is attached to the petition a certified copy of the order of Hon. Randolph Bryant, United States District Judge for the Eastern District of Texas, Tyler Division, which order is dated August 5, 1933, revoking the probation granted as alleged in the petition and ordering the issuance of a commitment for execution to the United States Marshal.

Further answering respondent alleges that on July 27, 1933, Mr. A. Escoe, father of the petitioner, wrote a letter to Hon. Oscar Gresham of Sherman, Texas, said Oscar Gresham being the duly appointed qualified and acting United States Probation Officer for the Eastern District of Texas, a copy of which said letter is attached to this response in place of the original by agreement of counsel, in which said letter facts were brought to the attention of said Probation Officer and that petitioner had violated the conditions of his probation.

Respondent alleges that in answer to said letter of the father of the petitioner, the United States Probation Officer wrote Mr. A. Escoe on July 29, 1933, acknowledging the letter of Mr. A. Escoe of July 27, 1933, and in which [fol. 11] said letter information was imparted to Mr. A. Escoe as to the procedure being taken to revoke the order of Probation heretofore given, a copy of said letter, by agreement of counsel, is attached to this response and made a part thereof.

Respondent further alleges that on July 30, 1933, Mr. A. Escoe, the father of the petitioner, again wrote Hon. Oscar Gresham, the United States Probation Officer, with reference to the petitioner having violated his probation, a copy of which said original letter is attached to this response and made a part thereof by agreement of counsel.

Respondent alleges that on July 31, 1933, the United States Probation Officer wrote Mr. A. Escoe concerning the revocation of the probation granted petitioner, a copy of which said letter is attached to this response and made a part thereof.

Respondent further alleges that there is attached to the response and made a part hereof, marked Exhibit 1, the following documents to-wit:

1. Certified copy of indictment upon which petitioner plead guilty.

2. Certified copy of journal entry of plea, judgment and sentence of petitioner.

3. Certified copy of application filed July 29, 1933, by the United States Probation Officer Oscar S. Gresham in the District Court of the United States for the Eastern District of Texas, Tyler Division. That said application was for the issuance of a capias for the arrest of petitioner for violation of his probation. That there also appears on said application the order of Hon. Randolph Bryant, United States District Judge for the District of Texas, ordering the issuance of capias for the arrest and delivery of the petitioner to the United States Probation Officer aforesaid.

4. Warrant for arrest of petitioner for a violation of probation.

5. Application of probation officer to revoke the probation heretofore granted petitioner and setting out reasons for the revocation of said probation. That there is attached to said application the order of Hon. Randolph Bryant the United States District Judge for said District made August 5, 1933, revoking the probation theretofore granted by him and directing the commitment of the petitioner to the United States penitentiary at Leavenworth, Kansas.

[fol. 12] 7. Commitment and return of Marshal on commitment confining petitioner to the United States Penitentiary at Leavenworth, Kansas.

Respondent alleges that there was no appeal from the order of the court revoking the probation or protest for bring the petitioner before the court.

Respondent alleges that it was not necessary under the Act of June 16, 1933, U. S. C. A. Title 18, Section 725, to bring the petitioner before the court.

Respondent further alleges that petitioner by his actions, in taking no appeal or protesting his commitment to the

United States Penitentiary at Leavenworth, Kansas, has waived any privilege he may have had to appear before the court.

Respondent further alleges that the procedure and discretion of the United States District Court for the Eastern District of Texas in revoking the probation granted herein cannot be raised by a writ of habeas corpus in this court.

Respondent having fully answered prays that the petition for writ of habeas corpus be denied.

S. M. Brewster, United States Attorney. L. E. Wyman, Assistant U. S. Attorney.

(Copy)

Marshall, Texas, July 27, 1933.

Hon. Oscar Gresham, Sherman, Texas.

DEAR MR. GRESHAM:

It is with much sadness that I write you this letter, but duty impells me to do so. Jack has broken his parole; he has been drunk four or five days, and has forged a few checks. I have tried my best to save him, but I have failed.

There is no question in my mind but that Jack has some kind of spells, but after all, he will be better off in confine-[fol. 13] ment than he will be running at large. I trust that when you send him to Leavenworth, you will see that he gets a treatment for whisky. The district attorney told me this afternoon that he would gladly release Jack to you.

There is one request, Mr. Gresham, I want to make of you, and that is this, get Jack out of Marshall just as quick as you can. I ask this to save embarrassment to our family. My wife and I are willing for Jack to go, for we are afraid that sometime when he gets drunk, he will do something desperate. When he is drunk, he has no mind at all.

I feel that Jack's sentence is a long one, but may be something will happen that the sentence can be shortened.

I hope you can come to Marshall tomorrow, but if you cannot, please advise me when you will be here, so I shall be in Marshall, I want to see you.

Thanking you for past favors and praying that God will save our boy from his ways, I am

Yours respectfully, (Signed) A. Escoe.

(Copy)

July 29, 1933.

Re Probation No. 194. Jack Escoe, Tyler Division.

Mr. A. Escoe, 701 East Austin Street, Marshall, Texas.

DEAR MR. ESCOE:

Your letter of July 27th calling my attention to a recent dereliction and infraction of the law and probation conditions by your son, Jack, has just been received.

Mr. Escoe, I cannot tell you how sorry I am that this eventuality has occurred. I am sorry for you and sorry for Mrs. Escoe because of the sorrow and humiliation this dereliction of Jack has brought to you, but I want to congratulate you, Sir, on your steadfastness, sense of fairness and sense of duty as disclosed by your report to me.

Judge Bryant has signed an order for a capias for the arrest of Jack. This will be forwarded to the clerk at Tyler and the capias will be issued and sent to me. After Jack is arrested on this capias, I shall immediately file a motion to revoke his suspended sentence and commit him. There is no other course to pursue.

[fol. 14] I wish you would write me just as soon as you get this letter and tell me whether Jack is in jail and where he can be found when the Marshal comes with the capias. I believe it would be better for him not know that this capias is being issued and particularly if he is not in jail. I shall ask the Marshal to remove him from Marshall just as soon as possible.

Also please write me telling me just exactly what Jack did. If he forged checks, the amount of the checks and the names of the persons whose signatures he forged. It is necessary for me to have this information in filing a motion to revoke. As soon as the capias is served and I hear from you, I shall write you further. I cannot come to Marshall at this time.

Very truly yours, Oscar S. Gresham, U. S. Probation Officer, Sherman, Texas.

(Copy)

Marshall, Texas, July 30, 1933.

Hon. Oscar S. Gresham, Sherman, Texas.

DEAR MR. GRESHAM:

I have received your letter, and shall hasten to reply. I don't know where to begin, but I shall try to tell you what you want to know.

You asked whose names Jack forged to the checks. He forged mine to two checks, one to the Sugar Bowl Cafe for $10, and one to Leonard Johnson for $15. I could have got him by with this, but I felt that it would be very wrong to do that. He has been drinking here for several days. He has never forged any other name to a check but mine. When I had money I paid these checks, but now I have no money. The only reason I ever paid a check for Jack was that I knew he had spells, when he did not know what he was doing. Right here in Marshall I can find twenty leading men who will go in court and swear that there are times when Jack does not know what he is doing. It seems cruel for a man to have to serve a term in prison under such circumstances. However, I made you a promise at Tyler that I would report any violation of his parole to you. I have kept my promise. I wish to say right here that he had a charge of insanity preferred against him in this court two years ago, but before he could be tried, he left Marshall. Had his trial gone to court, he would have been convicted. When I was at Tyler, I wanted to tell Judge Bryant these things, but I did not get a chance to do so. Of course I regret to see the boy go to prison and serve at hard labor for a long term of years for something seemingly he cannot help. I want to further state, however, that Jack should not be permitted to run at large in his present condition. But he needs treatment worse than he needs punishment.

[fol. 15] I have been wondering if there is a place owned by the Federal authorities where men can be treated. If he is not cured, he will spend his life behind the bars. I have been thinking that possibly Judge Bryant has the power to shorten his term at Leavenworth. The first sentence he gave Jack was for eighteen months. Personally I wanted to accept that sentence, however, I wrote Judge Bryant, asking for a suspension of sentence. I

was just afraid that Jack would have a spell and break his parole.

I was talking with Judge P. O. Beard Saturday, and Judge Beard said Jack should be confined but not in a penitentiary. Judge Beard was Jack's first friend, when Jack was in Leavenworth, or rather when Jack got out on parole.

I trust that you understand my attitude. I have all confidence in Judge Bryant. I think he is one of the greatest and best men I ever met in all my life, and whatever Judge Bryant sees fit to do, will meet with my approval.

My wife is signing this letter with me.

Yours respectfully, (Signed) A. Escoe, (Signed) Mrs. A. Escoe.

Mr. Gresham I failed to tell you that Jack is in the Harrison county jail, and will remain there till you send for him. I thought I told you in my first letter that Jack was in jail. Another thing I wish to say is this, Jack thinks that the District Attorney turned him in to you. If it makes no difference to you, just let him keep thinking it. I wish you would let Judge Bryant read my and my wife's letter to you.

(Signed) A. Escoe.

(Copy)

July 31, 1933.

Mr. A. Escoe, 701 East Austin Street, Marshall, Texas.

DEAR MR. ESCOE:

I thank you and Mrs. Escoe for your very courteous letter of July 30, 1933.

I note what you say with respect to my showing the letter to Judge Bryant. It will be three or four days before I can prepare and present to the Judge a motion to revoke the suspended sentence and commit your son to the institution to which he was originally sentenced.

[fol. 16] In the meantime, I wish, if you so desire, that you and Mrs. Escoe would write to Judge Bryant and tell him anything and everything you desire to say concerning the matter of the revocation of your son's suspended sentence and his commitment to Leavenworth. I assure you that anything you may write Judge Bryant will be carefully considered by him and I think it would be much

better for the information you desire to convey to him to go directly to him and not be communicated through me.

I would be glad if you would send me a copy of any communication you send to Judge Bryant.

Very truly yours, Oscar S. Gresham, U. S. Probation Officer, Sherman, Texas.

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EXHIBIT 1 TO RESPONSE

Indictment omitted. Printed side page 6 ante.

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[fols. 17 & 18] Judgment omitted. Printed side page 7 ante.

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[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

No. 3499-Cr.

Probation No. 194

THE UNITED STATES

v.

JACK ESCOE

APPLICATION FOR CAPIAS

To Honorable Randolph Bryant, Judge:

On October 5, 1932, in the United States District Court, for the Eastern District of Texas, Tyler Division, the defendant, Jack Escoe, entered his plea of guilty to a charge of violation the National Motor Vehicle Theft Act. His plea of guilty was accepted by the Court, whereupon the Court imposed upon the defendant a sentence of four and a half years in the United States penitentiary at Leavenworth, Kansas. This sentence, however, was suspended for five years on written probation conditions signed by the defendant and Probation Officer.

The defendant, Jack Escoe, having wilfully and grossly violated the conditions of his probation in this; having,

since he has been on probation, committed a felony under the Statutes of the State of Texas, to-wit: forgery, Probation Officer files this application and asks the Court for an order to issue capias for the arrest of the defendant and deliver the same to Probation Officer to the end that the defendant may be placed in jail, a motion prepared for the revocation of his suspended sentence and commitment to the United States Penitentiary to serve the sentence originally imposed.

This July 29, 1933.

Oscar S. Gresham, United States Probation Officer.

[fol. 20] The foregoing application of Probation Officer having been heard and considered by the Court,

Ordered that the Clerk file this motion and issue a capias for the arrest of said defendant and deliver the same to Oscar S. Gresham, United States Probation Officer.

This July 29, 1933.

Randolph Bryant, Judge.

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DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF TEXAS

CAPIAS

The President of the United States of America

To the Marshal of the Eastern District of Texas—Greeting:

You are hereby commanded to take Jack Escoe, alias Jack Adams, alias Jack Thomas, late of the County of Smith, if he shall be found in your District, and that you safely keep him, so that you may have his body before the District Court of the United States of America, for the Eastern District of Texas, in the Fifth Circuit, before the Judge of the same Court instanter, to answer unto the United States of America, in a plea of tespass; and also in a certain bill of the United States of America against said defendant for having wilfully violated the conditions of his probation, according to the custom of the said court, before said court, then and there to be exhibited, and have you also then and there this writ.

Witness, the Honorable Randolph Bryant, Judge of said Court, and the seal thereof, at Tyler, Texas, this 31st day of July, in the year of our Lord one thousand nine hundred and thirty-three and of American Independence the 158th year.

F. A. King, Clerk, U. S. District Court, Eastern District of Texas, by Susie Kerr, Deputy.

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[fol. 21] MARSHAL'S RETURN

Received this writ on the Third day of August, 1933, and I executed the same on the Fourth day of August, 1933, at Marshall, Texas, by arresting the within-named defendant Jack Escoe and now have his body in my custody.

Phil E. Baer, U. S. Marshal, Eastern District of Texas, by A. B. Faust, Deputy.

Endorsed: D. Cr. No. 3499. United States District Court, Eastern District of Texas. The United States of America vs. Jack Escoe. Capias. Issued July 31, 1933, returnable instanter. F. A. King, Clerk, by Susie Kerr, Deputy.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Cr. No. 3499

Probation No. 194

THE UNITED STATES

v.

JACK ESCOE, alias JACK ADAMS, alias JACK THOMAS

REPORT OF PROBATION OFFICER

To the Honorable Randolph Bryant, Judge:

On October 5, 1932, the defendant Jack Escoe, in the United States District Court for the Eastern District of Texas, Tyler Division, the Honorable Randolph Bryant, Judge presiding, entered his plea of guilty to a violation of the National Motor Vehicle Theft Act.

His plea of guilty was accepted by the Court and on October 10, 1932, the following sentence was imposed:

4½ years confinement in the United States Penitentiary, Leavenworth, Kansas. The execution of said sentence, however, was suspended for five years on probation conditions in writing at that time delivered to the defendant by Probation Officer.

Supervision began on October 10, 1932, and the defendant from that day until the violation of Probation Condi-
[fol. 22] tions hereinafter named, continued to report to Probation Officer that defendant had violated his condi- being signed and approved by his father, Mr. A. Escoe.

On July 29, 1933, it having come to the knowledge of Probation Officer that defendant had violated his conditions of probation as hereinafter shown, application was made to Your Honor for an order directing the clerk to issue capias for the arrest of said Jack Escoe. The application was granted by the court on July 29, 1933, which said application for capias was forwarded to the clerk of the United States District Court for the Eastern District of Texas, Tyler, for issuance of the capias. Capias was issued and returned to Probation Officer. Whereupon, it was forwarded to Honorable Phil E. Baer, United States Marshal, Paris, Texas, for execution and return, with the information that the defendant, Jack Escoe, would be found in the County Jail at Marshall, Texas.

One of the conditions of probation prescribed by the court in this case was: (a) Refrain from the violation of any state or Federal Penal Laws.

Another condition of probation prescribed by the court was: (b) Lead a clean, honest and temperate life.

The defendant, Jack Escoe, has violated the two conditions of probation above set out in this: He forged the name of his father, A. Escoe, to a check for $10.00 and passed the same to the Sugar Bowl Cafe. He likewise forged his father's name to a check for $15.00 and passed the same on one Leonard Johnson, thus committing, under the laws of the State of Texas, two felonious acts.

The defendant, Jack Escoe, for several days prior to the time he committed the felonious acts above stated, had been intoxicated.

Wherefore, Probation Officer files this motion and asks the court for an order revoking the suspended sentence of

the said Jack Escoe and directing the clerk to issue a commitment to the United States Penitentiary at Leavenworth, Kansas, to serve the sentence of four and a half years originally imposed.

[fol. 23] Probation Officer submits to the court herewith a detailed history of the defendant, of his attempted supervision and of his past criminal record.

This August 5, 1933.

Oscar S. Gresham, United States Probation Officer.

The foregoing motion having been heard and considered by the court,

Ordered, That the suspended sentence heretofore on, to-wit: October 10, 1933, be, and the same is hereby in all things revoked. The Clerk will file this motion and order and issue a commitment and deliver the same to the Marshal for execution.

This August 5, 1933.

Randolph Bryant, Judge.

(Endorsed) No. 3499. The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas. Report and Motion of Probation Officer and Order of Court thereon. Filed Aug. 7, 1933, F. A. King, Clerk U. S. Court, by J. R. Blades, Dep.

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COMMITMENT

Cr. 3499

THE UNITED STATES

vs.

JACK ESCOE

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

The President of the United States of America:

To the Marshal of the United States for the Eastern District of Texas and to the Warden of the United States Penitentiary at Leavenworth, Kansas, Greeting:

Whereas, at the October term of said Court, 1932, held at Tyler in said district and division, to-wit, on October 10,

1932, Jack Escoe was senteneed by said Court, upon his [fol. 24] plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of four (4) years and six (6) months for violation of the National Motor Vehicle Theft Act—to-wit, for unlawfully, knowingly, fraudulently and feloniously transporting in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, thence to Tyler, in the State of Texas, a certain motor vehicle, a Chevrolet Roadster, knowing same to have been stolen property. Sentence suspended for a period of five (5) years upon condition, among other requirements, of good behavior, and,

Whereas, said suspended sentence has been revoked by order of court of date August 5, 1933, on motion of U. S. Probation Officer, Eastern District of Texas,

And Whereas, the Attorney General of the United States has designated the United States Penitentiary at Leavenworth, Kansas, as the place of confinement where the sentence of said Jack Escoe shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Jack Escoe and him safely transport to said U. S. Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said Jack Escoe and him keep and imprison in accordance with said sentence, beginning August 5, 1933, date suspended sentence revoked, or until he shall be otherwise discharged by due course of law.

Witness the Honorable Randolph Bryant, Judge of said Court, and the seal thereof, affixed at Tyler, in said district, this 7th day of August, 1933.

F. A. King, Clerk, by J. R. Blades, Deputy Clerk.
(L. S.)

[fol. 25] Return

I have executed the within writ in the manner following, to-wit: On August 4th, 1933, I delivered said Jack Escoto the Jailer of the Lamar County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on August 12th, 1933, I delivered said Jack Esco- to the Warden of Leavenworth Penitentiary at

Leavenworth, Kansas, together with a copy of this commitment.

Phil E. Baer, United States Marshal, by Della Ashley, Deputy.

Certified Copy

UNITED STATES OF AMERICA,
Eastern District of Texas, ss:

I, F. A. King, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Judgment of Conviction and sentence, Application for Capias and order of Court thereon, Capias, Report and Motion of Probation Officer and Order of Court thereon, and Commitment in the case of The United States vs. Jack Escoe, alias Jack Adams, alias Jack Thomas, Cr. No. 3499, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Tyler, Texas, this 8th day of December, A. D. 1933.

F. A. King, Clerk, by Ruth B. Head, Deputy Clerk.
(Seal.)

[fol. 26] Endorsed: 3499. United States District Court. Eastern District of Texas. The United States vs. Jack Escoe. Certified copy Indictment, Judgment of Conviction and Sentence, Application for Capias & Order thereon, Capias, Report and Motion of Probation Officer & Order thereon, and Commitment.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS AND DENYING WRIT—Filed Jan. 26, 1934

Now on this 26th day of January, A. D. 1934, at Topeka, Kansas, came regularly on for hearing the motion of the respondent to dismiss the petition for writ of habeas corpus filed herein. The petitioner appeared by Floyd Strong, his

attorney, and the respondent appeared by L. E. Wyman, Assistant United States Attorney, the Court upon being duly advised in the premises finds and orders that said motion to dismiss should be and the same is hereby overruled to which finding and order the respondent excepts and his exceptions are hereby allowed.

Upon application of the respondent, it is thereupon directed that the respondent file a response to the petition herein forthwith and that the petitioner if he so desires file his reply to said response.

Thereupon the petitioner introduced his evidence including the exhibits attached to his petition and rested, the respondent thereafter introduced his evidence including the exhibits attached to the response and rested.

The court after argument of counsel and after consideration of all of the pleadings filed herein and being duly advised in the premises, finds that said writ for habeas corpus should be and the same is hereby denied, to which finding and order the petitioner excepts and his exceptions are hereby allowed.

Richard J. Hopkins, Judge.

Approved: L. E. Wyman, Attorney for Petitioner.
Floyd D. Strong, Attorney for Respondent.

[File endorsement omitted.]

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[fol. 27] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 27, 1934

In the District Court of the United States

To the United States District Attorney, for the District of Kansas.

Notice is hereby given you that Jack Escoe, the petitioner in the above entitled cause, has this day taken his appeal from the final judgment of the Court dismissing the application for a writ of habeas corpus and refusing to grant the relief prayed for in said petition. Said order granting the dismissal of the petition and refusing the relief therein

prayed for, was made and entered of record on or about the 26th day of January, 1934 A. D.

Jack Escoe, in Propria Persona.

Dated this the 23 day of March 1934 A. D.

Jack Escoe, P. O. Box #7, Leavenworth, Kansas:

Notice acknowledged March 26, 1934.

L. E. Wyman, Asst. U. S. Atty.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 27, 1934

Comes now, Jack Escoe in the above entitled cause and respectfully shows to this Honorable Court, that on or about the 26th day of January, A. D., a final judgment was rendered and entered of record sustaining a motion to dismiss the petition for a writ of habeas corpus and refusing to issue the writ of habeas corpus for to all of which action and ruling of the court petitioner was allowed exception.

That in said action and ruling of the court, and the judgment and proceedings error was committed to the harm [fol. 28] and prejudice of petitioner, all of which will appear in detail in the assignment of error hereto attached.

Wherefore, petitioner prays that an appeal be allowed from such action, ruling final judgmgent to the Circuit Court of Appeals for the Tenth Circuit. And:

Your petitioner prays that a transcript of record and proceeding and papers upon which such order was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Tenth Circuit.

Jack Escoe, Petitioner and Appellant.

In United States District Court

Order Allowing Appeal—Filed March 27, 1934

Appeal allowed this 27 day of Mar. 1934, A. D. Appeal Bond $500.00.

Richard J. Hopkins, United States District Judge.

[File endorsement omitted.]

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In United States District Court

Assignment of Errors—Filed March 27, 1934

Now comes Jack Escoe, the petitioner and appellant in the above cause and files the following assignment of errors upon which he will rely in his prosecution of an appeal to the United States Circuit Court of Appeal for the Tenth Circuit, from the order of this Court refusing to produce the body and denying and dismissing the petition for a writ of habeas corpus, on or about the 26th day of January, A. D. 1934, and refusing to grant relief prayed for therein, to-wit:

First

The District Court erred in refusing to produce the body [fol. 29] of the petitioner as provided therefor under the provisions of section 458, Title 28, of the United States Criminal Code.

Secondly

The District Court erred in to the harm and prejudice of the petitioner in denying the relief prayed for in the petition for a writ of habeas corpus, and in granting the motion dismissing the petition.

Thirdly

That the District erred in ruling that probation or suspended sentence could be revoked without opportunity for a hearing being given as provided for under Section 725, Title 18, of the United States Criminal Code and the Constitution of the United States.

Fourthly

That the District Court erred in ruling that under Section 725, Title 18, of the United States Criminal Code as amended June 16, 1933, that probation or suspended sentence could be revoked without a hearing.

Fifthly

That the District Court erred in permitting the United States Attorney to introduce, and to be guided by, evidence used by the trial court in revoking appellant's probation or suspended sentence without a hearing, in deciding whether or not your petitioner was unlawfully restrained of his liberty without due process of law in violation of his guarantees under the Constitution of the United States.

Wherefore, the petitioner and appellant respectfully prays that said order denying the production of his body in Court; and the order of dismissal and final judgment may be reversed and that the said Jack Escoe be ordered discharged from his present unlawful imprisonment as prayed for in the petition for a writ of habeas corpus.

Jack Escoe, Petitioner Per Se.

[fol. 30] *Duly sworn to by Jack Escoe. Jurat omitted in printing.*

[File endorsement omitted.]

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In United States District Court

Præcipe for Transcript of Record—Filed March 27, 1934

To the United States District Court Clerk for the District of Kansas:

You are hereby requested that under the ruling of the Court, you prepare a transcript of the record in the above entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, under notice of appeal from the above District Court; and to:

(1) Petition—brief for writ of Habeas Corpus.
(2) Response—motion to deny and dismiss petition.
(3) Order of the Court denying writ of Habeas Corpus.

(4) Notice of appeal.
(5) Petition for appeal.
[fol. 31] (6) Order allowing appeal.
(7) Assignment of errors.
(8) Citation and service of same.
(9) Præcipe for transcript.
(10) Motion to file and docket transcript in Forma Pauperis.

Jack Escoe in Propria Persona.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AND DOCKET TRANSCRIPT AND PROCEED IN FORMA PAUPERIS—Filed March 27, 1934

Comes now, Jack Escoe, the appellant and moves this Honorable Court to grant him leave to file and docket the transcript and proceed to prosecute said appeal in forma pauperis. That he is a citizen of the United States, and a resident of Marshall, Texas. That because of his poverty he is unable to pay the clerk's general fee for filing of the transcript in this Court or give security for said costs and that he is unable to pay cost of printing of the record; that he verily believes he has a meritorious cause of action and entitled to the redress he seeks by said appeal, and that his appeal is taken in good faith.

Jack Escoe, Appellant.

[File endorsement omitted.]

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[fol. 32] IN UNITED STATES DISTRICT COURT

STATE OF KANSAS,
County of Leavenworth, *ss:*

AFFIDAVIT IN FORMA PAUPERIS—Filed March 27, 1934

Jack Escoe, being first duly sworn, says that he desires to proceed with the appeal from a decision rendered by the United States District Court of Kansas.

That he is a citizen of the United States, a resident of the City of Marshall, Texas.

That because of his poverty he is unable to pay the Clerk's general costs of filing the transcript or for printing of the record in said cause, or give security for said costs.

That he verily believes that he is entitled to redress he seeks by said appeal is taken in good faith.

Wherefore, appellant and affiant prays that he be granted leave to proceed in forma pauperis as is provided for under the provisions of an act of Congress approved July 20, 1892 as amended June 25, 1910 and June 27, 1922, and he will ever pray.

Jack Escoe, Affiant.

Subscribed and sworn to before me this 23 day of March 1934 A. D.

E. H. Eckholdt, Notary Public, County of Leavenworth, State of Kansas. [Notarial Seal.] My commission expires April 29, 1935.

[File endorsement omitted.]

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[fol. 33] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

ORDER GRANTING LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS—May 16, 1934

This cause came on to be heard on the motion of appellant for leave to docket the case and to prosecute the appeal herein as a poor person and to have the appeal considered by the court on a typewritten transcript of the record and typewritten copies of brief of appellant, and was submitted to the court.

On consideration whereof, and for good cause shown, it is now here ordered by the court that the said motion be

and the same is hereby granted and that appellant may docket the cause instanter, which is accordingly done, and prosecute the appeal without being required to prepay fees or costs or to give security therefor.

It is further ordered by the court that appellant be and he is hereby granted leave to have the appeal considered upon a certified typewritten transcript of the record and typewritten copies of his brief.

It appearing to the court that the appellant is a poor person and unable to employ counsel, it is further ordered that Floyd D. Strong, Esquire, be and he is hereby designated and assigned as counsel for appellant to prosecute the appeal in this cause.

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[fol. 35] In United States Circuit Court of Appeals

Before Honorable Robert E. Lewis, Circuit Judge, Honorable Orie L. Phillips, Circuit Judge, and Honorable Tillman D. Johnson, District Judge.

Order of Submission—Sept. 21, 1934

This cause came on to be heard, Harry C. Green, Esquire, appearing for appellant, no one appearing for appellee.

On motion, appellant was granted leave to file four typewritten copies of a reply brief in this cause instanter, which was accordingly done.

Thereupon this cause was argued by counsel for appellant and was submitted to the court.

[fol. 36] In United States Circuit Court of Appeals, Tenth Circuit, September Term, A. D. 1934

No. 1095

Jack Escoe, Appellant,

vs.

Fred G. Zerbst, Warden, Appellee

Appeal from the District Court of the United States for the District of Kansas, First Division

Before Lewis and Phillips, Circuit Judges, and Johnson, District Judge

Mr. Harry C. Green for appellant.

Mr. S. S. Alexander and Mr. L. E. Wyman submitted brief for appellee.

Opinion—January 7, 1935

Johnson, District Judge, delivered the opinion of the Court:

On the 18th day of December, 1933, Jack Escoe, appellant, filed in the court below his petition praying that a writ of habeas corpus issue directing the appellee Zerbst, warden of the United States penitentiary at Leavenworth, at a time to be stated, to have the petitioner before the court and on [fol. 37] hearing had to discharge him from said penitentiary. On the 26th day of January, 1934, the trial court made the following order:

"Now on this 26th day of January, A. D. 1934, at Topeka, Kansas, came regularly on for hearing the motion of the respondent to dismiss the petition for writ of habeas corpus filed herein. The petitioner appeared by Floyd Strong, his attorney, and the respondent appeared by L. E. Wyman, Assistant United States Attorney, the court upon being duly advised in the premises finds and orders that said motion to dismiss should be and the same is hereby overruled to which finding and order the respondent excepts and his exceptions are hereby allowed.

"Upon application of the respondent, it is thereupon directed that the respondent file a response to the petition

herein forthwith and that the petitioner if he so desires file his reply to said response.

"Thereupon the petitioner introduced his evidence including the exhibits attached to his petition and rested, the respondent thereafter introduced his evidence including the exhibits attached to the response and rested.

"The court after argument of counsel and after consideration of all of the pleadings filed herein and being duly advised in the premises, finds that said writ for habeas corpus should be and the same is hereby denied, to which finding and order the petitioner excepts and his exceptions are hereby allowed."

This order recites that evidence was introduced by the parties respectively. No bill of exceptions is found in the record preserving the same. We are limited, as apparently the trial court limited itself, to a consideration of the pleadings including the exhibits attached.

The applicable statute is that part of the second paragraph of Section 725, Title 18, U. S. C. A., as amended on June 16, 1933, which reads:

"At any time within the probation period the probation officer may arrest the probationer wherever found, without [fol. 38] a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. * * * Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

The allegations of the petition material to the present inquiry are:

"That on October 5, 1932, he appeared before the United States District Court, Eastern Division, of the District of Texas, at Tyler, Texas, to answer an indictment alleged a

violation of the National Motor Vehicle Theft Act. A certified copy of said indictment is hereto attached.

"That he entered a plea of guilty to said indictment, and was sentenced by said court, and said sentence be and the same is hereby suspended for a period of five (5) years on conditions of probation and the defendant be placed in charge of the district probation officer for that length of time. A certified copy of the judgment and sentence is hereto attached.

"While he was at liberty under the suspended sentence, he was arrested at Marshall, Texas, on an order of the United States District Court for the Eastern District of Texas, Tyler Division, * * * that instead of being taken before said court at Tyler, Texas, and given a hearing as provided by law and the Constitution of the United States, he was on August 11, 1933, brought directly from Paris, Texas, by a deputy United States marshal * * * and [fol. 39] surrendered to the warden of the United States penitentiary at Leavenworth, Kansas, where he has at all times since been imprisoned.

"That by reason of the fact that he was brought directly to the United States penitentiary at Leavenworth, Kansas, without such hearing before the court that sentenced him, he is lawfully imprisoned and restrained of his liberty."

The copy of the judgment and sentence attached to the petition recites that:

"On the 10th day of October, A. D. 1932, the defendant again appearing and being asked by the court if he had anything to say why the judgment and sentence of the court should not be pronounced upon him, in accordance with his confessed plea of guilty, entered in this cause on the 5th day of October, A. D. 1932, and no good cause being shown why the judgment and sentence should not be pronounced herein;

"It is, therefore, considered by the court and so ordered, adjudged and decreed that the defendant is guilty of violation of the National Motor Vehicle Theft Act, to-wit: of unlawfully, knowingly, fraudulently and feloniously transporting in interstate commerce from New Orleans, in the State of Louisiana, to Marshall, in the State of Texas, a certain motor vehicle, a Chevrolet roadster, knowing same

to have been stolen property as charged in the indictment herein, and his punishment is fixed and assessed as follows:

"That the defendant be imprisoned in the United States penitentiary at Leavenworth, Kansas, for a period of four (4) years and six (6) months.

"It appearing to the satisfaction of the court that the ends of justice and the best interest of the public, as well as that of the defendant will be subserved by the suspension of the execution of the sentence pronounced herein;

"It is therefore considered by the court, and so ordered, that said sentence be and the same is hereby suspended for [fol. 40] a period of five (5) years on conditions of probation and the defendant be placed in charge of the district probation officer for that length of time."

Following this is an order of that court as follows:

"That the suspended sentence heretofore granted the defendant be, and the same is hereby in all things revoked, and the clerk will issue a commitment and deliver the same to the United States marshal for execution. This August 5, 1933."

In his answer the warden substantially admits the allegations of the petition that the order of August 5, 1933, revoking the order of probation of five years and the suspension of the sentence of fours years and six months in the penitentiary at Leavenworth, was made in the absence of the defendant. Numerous matters are set up in the answer of the warden apparently in palliation of and as an excuse for the failure of the officer to take petitioner forthwith before the court as required by Section 725 both before and after its amendment on June 16, 1933. Only such part of the numerous matters set up in the answer of the warden will be given as tend to complete the court records in part attached to the petition.

In addition to the court records attached to the petition of appellant, certified copies of the following are attached to the answer of the warden: an application of the probation officer, filed July 29, 1933, alleging that Jack Escoe, the probationer, had violated the provisions of his probation stated generally, and in which he asked: "For an order to issue capias for the arrest of the defendant and deliver the same to probation officer to the end that the defendant

may be placed in jail, a motion prepared for the revocation of his suspended sentence and commitment to the United States penitentiary to serve the sentence originally imposed."

The record shows that on the same day the court made the following order:

"The foregoing application of probation officer having been heard and considered by the court,

[fol. 41] "Ordered that the clerk file this motion and issue a capias for the arrest of said defendant and deliver the same to Oscar S. Gresham, United States probation officer."

Following this is a warrant bearing date July 31st for the arrest of the probationer Escoe directed to the United States marshal. The return of the marshal endorsed on the warrant recites:

"Received this writ on the third day of August, 1933, and I executed the same on the fourth day of August, 1933, at Marshall, Texas, by arresting the within-named defendant Jack Escoe and now have his body in my custody."

On August 5th the probation officer filed in the court a written report respecting the conduct of Escoe the probationer in which he charged that:

"On July 29, 1933, it having come to the knowledge of probation officer that defendant had violated his conditions of probation as hereinafter shown, application was made to your Honor for an order directing the clerk to issue capias for the arrest of said Jack Escoe. The application was granted by the court on July 29, 1933, which said application for capias was forwarded to the clerk of the United States District Court for the Eastern District of Texas, Tyler, for issuance of the capias. Capias was issued and returned to probation officer. Whereupon, it was forwarded to Honorable Phil E. Baer, United States marshal, Paris, Texas, for execution and return, with the information that the defendant, Jack Escoe, would be found in the county jail at Marshall, Texas.

"One of the conditions of probation prescribed by the court in this case was: (a) Refrain from the violation of any State or Federal penal laws.

"Another condition of probation prescribed by the court was: (b) Lead a clean, honest and temperate life.

[fol. 42] "The defendant Jack Escoe, has violated the two conditions of probation above set out in this: He forged the name of his father, A. Escoe, to a check for $10.00 and passed the same to the Sugar Bowl Cafe. He likewise forged his father's name to a check for $15.00 and passed the same on one Leonard Johnson, thus committing, under the laws of the State of Texas, two felonious acts.

"The defendant, Jack Escoe, for several days prior to the time he committed the felonious acts above stated, had been intoxicated.

"Wherefore, probation officer files this motion and asks the court for an order revoking the suspended sentence of the said Jack Escoe and directing the clerk to issue a commitment to the United States penitentiary at Leavenworth, Kansas, to serve the sentence of four and a half years originally imposed.

"Probation officer submits to the court herewith a detailed history of the defendant, of his attempted supervision and of his past criminal record."

Then follows the order of the court dated August 5, 1933, already quoted in part, which, quoted in full, recites:

"The foregoing motion having been heard and considered by the court:

"Ordered, that the suspended sentence hertofore on, to-wit: October 10, 1933, be, and the same is hereby in all things revoked. The clerk will file this motion and order and issue a commitment and deliver the same to the marshal for execution."

A commitment under date of August 7th was thereupon issued under which the appellant at the time he filed his petition in the court below was being held by the appellee as warden of the Leavenworth penitentiary.

It appears from the records above set out that appellant when arrested was not forthwith taken before the court by the arresting officer and that he was not present at the [fol. 43] hearing of the application of the probation officer when the court on August 5, 1933, revoked the order of October 10, 1932, suspending his sentence of four years and six months in the penitentiary at Leavenworth.

It is the contention of appellant that the order of the court of August 5, 1933, revoking the order of suspension of sentence of October 10, 1932, made in his absence and

without opportunity of being heard in defense of the charges preferred against him by the probation officer, was void; that is to say, it is the contention of appellant that the court exceeded its jurisdiction when it made the order of August 5th in his absence and without affording him opportunity to defend himself against the charges preferred against him by the probation officer. It will be noted that the statute does not lay down any rule of procedure respecting either the granting of probation, the suspension of sentence, or the revocation of orders of probation or of suspension of sentence. It does provide that on arrest the probationer shall forthwith be taken before the court, presumably for the purpose of hearing and disposing of pending accusations. It is elementary and fundamental of course that no one accused of wrongdoing should be condemned in his absence and without opportunity for defense, but in view of the broad provisions of the Probation Act it does not necessarily follow that the failure to have appellant present in court and to afford him opportunity to answer the accusations made against him by the probation officer rendered the order of August 5th void; the court did not pronounce the sentence which appellant is now serving on that day; that sentence had been previously pronounced on October 10, 1932, when he was present. At that time and pursuant to the probation statute the sentence then pronounced was suspended and appellant was placed on probation for five years under the conditions specified in the application for revocation later filed by the probation officer. It is clear that the court had authority on August 5th to revoke the probation order, including the suspension of sentence made by it on October 10, 1932. It had continuing jurisdiction after that date of both the case and of [fol. 44] the person of appellant in respect to his probation. On August 5th and at the time the order revoking the suspension of sentence was made appellant was under arrest and in the custody of the United States marshal on a warrant issued at the direction of the court. It is apparent from the record that at the hearing on August 5th testimony and evidence in support of the charges made by the probation officer were taken and considered by the court, and that upon the evidence and testimony so taken the order revoking probationer's sentence was made. If the evidence so taken was untrue and the revocation of his pro-

bation and suspension of sentence unfair and unjust, the probationer long ago could have applied to the court for a re-hearing upon a proper showing made and the injustice corrected. The fact that he has never made such application tends to show that he actually has no real cause for complaint. Instead of pursuing this course he has chosen to invoke the high and privileged remedy of habeas corpus and is now asking this court to read into the Probation Act of Congress a rule of criminal procedure which would make the order of August 5th absolutely void. In this period of enlightened procedural liberalization it may not be supposed that Congress intended to or that the courts will by construction weigh down and encumber the Probation Act of Congress with the outworn technicalities of the old criminal procedure. Indeed the Supreme Court of the United States in Burns v. United States, 287 U. S. 216, has already, as we think, freed it from such barnacles. The court in that case has said:

"The Federal Probation Act * * * confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. * * * Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and [fol. 45] cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied 'that the ends of justice and the best interests of the public, as well as the defendant, will be subserved,' to suspend the imposition or execution of sentence, and 'to place the defendant upon probation for such period and upon such terms and conditions as they may deem best.'

"There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and is in terms equally broad. 'The court may revoke or modify any condition of probation, or may change the period of probation.' There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years. * * *

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial dis-[fol. 46] cretion. That exercise implies conscientious judgment, not arbitrary action. * * * It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' * * * While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

In the Burns case the Supreme Court held that there had been no abuse of discretion by the trial court, a question which could be considered on that appeal. Whether there was an abuse of discretion by the court of the Eastern District of Texas is not before us in this proceeding. The only question here involved is whether that court had jurisdiction to make the order of August 5th. We think it did have jurisdiction to make the order.

The judgment is affirmed.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Jan. 7, 1935

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Fred G. Zerbst, Warden of the United States Penitentiary at Leavenworth, Kansas, appellee, have and recover of and from Jack Escoe, appellant, his costs herein.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR REHEARING—Filed Feb. 4, 1935.

May it please this Honorable Court:

On January 7, 1935, this Honorable Court rendered its opinion in the above entitled cause, denying the applicant the writ of habeas corpus prayed for. The appellant, due to a lack of funds, has been unable to secure a copy of the decision rendered by this Honorable Court, and prays that this motion be considered without specific mention thereof.

Appellant earnestly contends that Section 725, Title 18, specifically provides that probationers, after arrest with or without a warrant, shall be carried before the Court for adjudication as to whether or not conditions of probation have been violated.

Appellant contends that he was never advised, either officially or unofficially why or for what reason his probation was revoked, and by not being carried before the [fol. 48] Court as specifically provided for by statute, he was denied an opportunity of being heard which is guaranteed by the Fifth Article to the Constitution of the United States.

That, by not being carried before the Court for a hearing on the alleged violations of the conditions of his probation

and formal sentence, he was denied the right of petitioning the Court for his original sentence of eighteen months.

Appellant further contends that the United States District Court of Kansas erred in permitting the United States Attorney to introduce, and be guided by, evidence used by the trial Court in revoking appellant's probation, in deciding whether or not your petitioner was unlawfully restrained of his liberty without due process of law.

Appellant earnestly believes this Honorable Court should take judicial notice of these circumstances and revise or amend the opinion of January 7, 1935. And for the other facts, circumstances and contentions herein presented, appellant submits that the opinion of January 7, 1935 be set aside and a rehearing granted upon the matter as a whole.

Wherefore, appellant ever prays.

Respectfully submitted, Jack Escoe, Pro Se.

*Duly sworn to by Jack Escoe. Jurat omitted in printing.*

[File endorsement omitted.]

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[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Feb. 12, 1935

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

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NOTE RE MANDATE

(On February 25, 1935, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

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[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed April 1, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is advanced and assigned for argument on Monday, April 29th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. Enter Jack Escoe, pro se. File No. 39,401. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 773. Jack Escoe, Petitioner, vs. Fred G. Zerbst, Warden of the United States Penitentiary at Leavenworth, Kansas. Petition for a writ of certiorari. Filed March 9, 1935. File No. 773 O. T. 1934.